

1 State of New Hampshire Banking Department

2

3 In re the Matter of:) Case No.: 07-101
)
 4 State of New Hampshire Banking)
)
 5 Department,)
) Recommended Decision by the Presiding
 6 and) Officer
)
 7 Thomas and Kristen Baker)
)
 8 Complainant,)
)
 9 and)
)
 10 Tri-State Mortgage Consultants, LLC,
 11 Respondent

12
13 Recommended Decision

14 The Complainants had the burden of establishing a prima facie case that
15 a violation of the chapter or an unfair and deceptive trade practice had
16 occurred. For the reasons set forth below I find that they failed to meet
17 that burden.

18 Procedural Background and Authority

19 Pursuant to RSA 383:10-d the commissioner shall have exclusive authority
20 and jurisdiction to investigate conduct that is or may be an unfair or
21 deceptive act or practice under RSA 358-A and exempt under RSA 358-A:3, I or
22 that may violate any of the provisions of Titles XXXV and XXXVI and
23 administrative rules adopted thereunder. The Commissioner may hold hearings
24 relative to such conduct and may order restitution for a person or persons
25 adversely affected by such conduct.

1 On October 23, 2006, the New Hampshire Banking Department
2 ("Department") received a complaint from Complainants via the Consumer
3 Protection and Antitrust Bureau of the Attorney General's Office regarding
4 Respondent's actions in a loan that closed on Friday, March 17, 2006. On
5 review, the Commissioner determined that the initial documents submitted
6 contained a factual discrepancy between the parties, and that a proper
7 determination of what restitution is due, if any, would best be determined by
8 an administrative hearing wherein each party would have an opportunity to
9 present their evidence to an appointed Presiding Officer.

10 I was appointed Presiding Officer. In preparation for the hearing, I
11 requested a Bank Examiner perform an analysis of the loan file. Her analysis
12 was provided to the parties and formed the basis of her testimony. The
13 Complainants called her as a witness during their case in chief.

14 The Respondent consented to having the loan file submitted as Exhibit A
15 once non-public personal information was redacted.

16 The Complainants submitted Exhibits 1-10 and consented to having
17 Department staff redact the personal identifying information from them.

18 The hearing was convened on May 29, 2007. As stated in the Notice of
19 Hearing and reiterated at the hearing, the Respondent was charged with
20 answering the question of whether it had violated a provision of the New
21 Hampshire Banking Laws or committed an unfair or deceptive trade practice.
22 If the Presiding Officer determined that such a violation had occurred, then
23 he must then determine what restitution may be due to the Complainants for
24 the violation.

25 **Findings of Fact, Rulings of Law**

On the date of hearing there was testimony from the Complainants,
Thomas Baker and Kristen Baker; Lea Sabeau, a bank examiner; and Troy Dagues

1 and Sean McDonough, the loan officer for the subject loan and manager of
2 Respondent, respectively.

3 The Bakers further submitted memoranda styled as a proposed order after
4 the hearing. The memoranda could not reasonably be construed as proposed
5 findings of fact or rulings of law; however, to the extent it was helpful in
6 my analysis of this cause, I have used it herein.

7 The Bakers' principal concern as expressed in their complaint filed in
8 October was misrepresentation in the brokering of their loan. The loan they
9 received is commonly known as a 4-pay option ARM. It is a nontraditional
10 mortgage loan as that term is used in the Commissioners Guidance issued
11 November 13, 2006 (after this loan was closed). They alleged that the loan
12 officer had communicated to them that if they paid \$100 above their minimum
13 monthly payment that it would prevent "negative principal" on the loan.¹
14 They further contended that they were forced to sign a second mortgage with a
15 blank interest rate. A final point of contention was that their prepayment
16 penalty is in fact three years when they allege the loan officer advised them
17 it would be a one year prepayment penalty and they would not have signed the
18 loan if they had known it was more than a one-year prepayment penalty. They
19 contended that the proper resolution of this complaint was for the Respondent
20 to refinance them out of the loan (presumably into a more traditional loan

21 ¹ It is this officers opinion that what Complainants meant or understood by
22 "negative principle" is what is known in the industry as negative
23 amortization. Negative amortization occurs when a borrower is allowed to make
24 payments that amount to less than the full amount of principal and interest
25 currently due and when the remaining interest after payment is then added to
principal. By analogy this is the same process commonly used by credit card
companies in calculating balances.

1 product) and to pay whatever prepayment penalty may exist at the time of the
2 refinance and to accomplish this without further charge to them.

3 As noted the Hearing was convened to resolve factual discrepancies.
4 Even with the Hearing, Complainants were unable to meet their burden.
5 The Bakers called Lea Sabeau, an experienced bank examiner, as a witness in
6 this case. She testified that the Respondent had not committed any
7 violations of federal or state law in its handling of this loan transaction.
8 She stated that there was no evidence that any term of the Home Equity Line
9 of Credit (HELOC) used as a second mortgage in this case had been signed in
10 blank. The testimony on this issue satisfied this officer that the Bakers
11 misunderstood the HELOC; that there was not a blank interest rate, but an
12 undetermined draw from the line of credit which had caused the problem at the
13 closing. The Bakers were unable to provide any evidence beyond their
14 testimony to refute that the Respondent had complied with all regulatory
15 requirements. While Complainants continued to maintain that certain things
16 had been said which later turned out to be untrue, at best the evidence was
17 conflicting. Those alleged statements are dealt with in additional detail in
18 the context of the unfair and deceptive trade practice claim and will be
19 addressed further below.

20 I hereby make a finding of fact and ruling of law that aside from the
21 unfair and deceptive trade practice claim Respondent did not violate the New
22 Hampshire Banking Laws. I therefore find for the Respondent on this issue.

23 Deciding whether the Respondent committed this transaction in an unfair
24 and deceptive manner requires an analysis of not only the actual transaction
25 (already determined to be lawful), but also what representations were made
regarding the effect of the transaction. The testimony on this issue was
contradictory and did nothing to resolve the conflicting evidence that led to
this hearing.

1 Kristen Baker herself gave conflicting testimony during the hearing.
2 She unequivocally testified that the Bakers were not told about the possible
3 negative amortization of the product if they paid the minimum payment. Yet,
4 in her opening statement, she stated that Respondent had committed an unfair
5 and deceptive trade practice by telling her that if she paid the 1.5% minimum
6 monthly payment² plus \$100 she would avoid negative amortization.

7 Troy Dagues testified that he went over all aspects of the loan product
8 with the Bakers and that they seemed to understand the product completely.
9 He testified that they specifically talked about how the principal negatively
10 amortizes at first and then comes out of negative amortization as a result of
11 the rising minimum monthly payment amount. He admitted this result depended
12 on a steady index rate and that the index for this loan had risen
13 dramatically in the last year, somewhat unexpectedly. On my questioning he
14 admitted he often counsels his customers to make one "extra payment" per year
15 to drastically reduce the buildup of principal. The fact that the initial
16 minimum monthly payment was approximately \$1200 argues that either party
17 might have said something about \$100 per month. Both he and Sean McDonough
18 testified that their own home loans were this exact same product and they
19 were also taken aback by the quick rise in the index.

20 ² In the initial monthly statements for most 4-pay option ARM's that this
21 officer has seen there are four payment options listed in order of increasing
22 dollar amounts: a minimum monthly payment amount, an interest only amount, a
23 principal and interest amount based on a 30 year amortizing schedule, and an
24 amount which would effect repayment of the loan in 15 years. The borrower
25 may choose to pay any one of these amounts each month but must pay at least
the first amount.

1 Sean McDonough testified at great length about the benefits of a pay-
2 option ARM for those with unsteady monthly incomes such as commissioned
3 salespeople or those, like the Bakers, whose employers match their investment
4 contributions. In the context of whether the Respondent used an unfair and
5 deceptive practice to gain the business, his testimony is irrelevant as it is
6 uncontraverted that he never spoke with the Bakers until after the loan had
7 closed.

8 In addition to listening to the testimony, I have reviewed the loan
9 documents. The loan documents clearly reflect negative amortization of the
10 loan for a period of some years if the minimum monthly payments are made.
11 There are several documents in the loan file; all signed by the borrower,
12 which talk about the pay options that will appear on the bill. There is an
13 amortization schedule in the loan file, also signed by the borrower, which
14 shows that under the minimum monthly payment option the balance negatively
15 amortizes for the first 57 payments at which time the mortgage balance begins
16 to decrease again.

17 As noted previously, the Bakers in their initial complaint stated that
18 they would not have signed the loan documents if the loan had anything more
19 than a one year prepayment penalty. In their written complaint they
20 indicated they understood it to be a three year penalty. It was therefore
21 surprising to hear them argue at the hearing that they were shocked that it
22 was a three year prepayment penalty when Troy Dagues testified about that
23 aspect of the loan. Their testimony that they specifically negotiated a two
24 year prepayment penalty also is not supported by any other evidence and
25 flatly contradicts their own statements in their complaint. Mr. Dagues
specifically denied making any statements about what the prepayment penalties
would be, noting that the documents at closing would speak for themselves. He
also noted that, as a broker, he was unable to negotiate prepayment penalties

1 as those were always set by the lender in his experience. This latter
2 assertion was seconded by Mr. McDonough.

3 As noted above the loan file was submitted by Respondent as Exhibit A.
4 In the loan file, there are three separate documents, all signed by the
5 borrowers, which show a three year prepayment penalty.³ Granted one would
6 have to know that the term "3yrHPP" means three year prepayment penalty on
7 the Truth in Lending Disclosure Statement (TIL) and Application, but on the
8 Prepayment Penalty Addendum it clearly states "If within the first THIRTY SIX
9 months after the execution of this Note, I make prepayment(s)...I agree to
10 pay a Prepayment Penalty..." This further belies their statements in their
11 complaint that they would not have signed the loan documents if they had
12 anything other than a one year prepayment penalty.

13 This officer is quite familiar with the pace at which most closings
14 occur. Additionally, in other hearings and in other cases there have been
15 allegations that loan officers smooth over all objections to the terms at
16 closing in order to induce the borrower to sign documents. Neither of these
17 two factors was present at this closing. First, neither Mr. Dages nor any
18 other representative of the Respondent attended the closing. The Bakers went
19 to the closing with only the settlement agent in attendance. It is
20 uncontraverted that the settlement agent, a Massachusetts attorney, has no
21 affiliation with the Respondent. Second, there was clear testimony from the
22 Bakers that they read the closing documents and that they stopped the
23 proceedings when there was a problem with the amount not appearing on the
24 Home Equity Line of Credit they were using as a second mortgage.

24 ³ These have been photocopied out of the file and appended to the original of
25 this submission for ease of reference by the Commissioner.

1 Based upon these facts and the testimony, this officer cannot find that
2 the Respondent employed an unfair and deceptive practice to induce the Bakers
3 to transact business with them.

4 Finally, this officer notes that all witnesses testified about the
5 number of times the Bakers had refinanced their home. In those and in all
6 refinances, federal law requires lenders to extend the right to rescind the
7 transaction. The Bakers had the opportunity to rescind this transaction if
8 they were surprised by anything at the closing. They were adequately noticed
9 about their right of rescission at this closing as evidenced by their
10 signatures and an email Kristen Baker sent to Respondents after the closing
11 and within the rescission period threatening to rescind if he didn't respond
12 to her email.⁴ They chose not to do so. Had they rescinded, the alleged
13 damages as noted in the "proposed order" would never have arisen as they
14 would have been placed back into the position they were in before closing.

15 For the foregoing reasons I make a finding of fact and ruling of law
16 that Respondent did not commit an unfair and deceptive trade practice in this
17 transaction.

18 I therefore submit the attached proposed order for the Commissioner's
19 approval, disapproval or modification.
20

21 Respectfully submitted,

22 /S/
23 _____
24 James Shepard, Esq.
25 Presiding Officer

⁴ Complainant's Exhibit 8, Email dated 3/20/06.

